CIMB BANK BHD

v.

NG LEE LIAN & ANOR AND ANOTHER CASE

HIGH COURT MALAYA, JOHOR BAHRU
GUNALAN MUNIANDY JC
[SUITS NO: MT(2) 22-495-2007 & MT(2)-22-565-2007]
25 JANUARY 2011

CONTRACT: *Breach - Agreement - Whether plaintiff proved breach of Facilities Agreements by defendants - Evidence adduced*

CONTRACT: *Damages - Breach - Claim for malicious prosecution against plaintiff - Whether defendants established losses allegedly suffered by them as a consequence of plaintiff's wrongful act - Effect of - Whether malice on part of plaintiff proven*

CONTRACT: *Fraud - Conspiracy to defraud - Plaintiff changing account numbers of defendants - New accounts showing amount owing whilst old accounts showing discharge of debts - Effect of - Whether acceptable explanation given by plaintiff - Whether defendants established fraudulent design by plaintiff - Evidence adduced*

CIVIL PROCEDURE: *Action - Limitation period - Whether plaintiff time-barred from bringing action against defendants - Factors to consider - Limitation Act 1953, ss. 6(1) & 21(1)*

EVIDENCE: *Witness - Calling of witness by defence - Witness testifying pursuant to a Power of Attorney validly executed - Power of Attorney executed after commencement of suit - Whether affected capacity of witness to testify - Position of law - Effect of - Type of evidence sought to be given by witness - Whether s. 32 of the Evidence Act 1950 applicable - Effect of*

EVIDENCE: *Adverse inference - Failure to call material witness - Effect of - Whether adverse inference should be drawn - Evidence Act 1950, s. 114(g)*

Vide Letters of Offer ('L/O') dated 3 October and 3 December 1997 respectively, the plaintiff had granted the defendants two term loans ('T/L (1)' and 'T/L (2)' respectively) in the sums of RM300,000 each, subject to all the terms and conditions contained therein. In respect of T/L (1), the 2nd defendant had executed a charge over land in favour of the plaintiff while T/L (2) had been secured by a similar charge executed by the 1st defendant. The defendants defaulted on their term loan repayments and Notices of Demand ('NOD') and Withdrawals of

A Loan Facility were issued to them by the solicitors for the plaintiff. In view of their failure to respond to the NOD, this action was commenced against them. There were five main issues that arose for determination before this court: (i) whether the new account numbers '187-7' (first case) and '185-8' (second case) on which the claims had been based
B had been genuine or fraudulently created by the plaintiff's servants/ agents; (ii) whether the plaintiff's servants/agents had fraudulently manipulated the defendants' designated term loan accounts bearing numbers '1609' and '1670'; (iii) whether the defendants had still been liable to pay the plaintiff the sums claimed under the new T/L account
C numbers; (iv) whether these suits had been time barred under the Limitation Act 1953 and (v) whether the defendants had proved entitlement to the reliefs claimed for in their counterclaim. At the commencement of the hearing, the plaintiff's counsel ('P/C') raised a preliminary objection on DW1's competency to testify on behalf of the defendants by virtue of the Power of Attorney ('P/A') issued to him by
D the defendants (exh. D36), which had been registered after the commencement of this suit.

Held (dismissing plaintiff's claims; allowing, in part, the defendants' counterclaim):

E

(1) No provision of law or authority had been adduced to show that a witness who appeared under a valid P/A, which had been issued by a party to the suit, had not been competent to testify unless the P/A had been registered prior to the commencement of the suit. As to the question of personal knowledge of facts at the
F material time, this had been a fact that had to be determined from the evidence given by DW1 and not one to be peremptorily decided before hearing it. DW1's evidence as a whole had not appeared to consist of statements made by the defendants but of facts from his personal knowledge. P/C's argument that DW1
G could only testify by recourse to s. 32 of the Evidence Act 1950 ('EA'), had been flawed as that section had not been applicable since DW1's evidence had not been based on statements given by the defendants. Similarly the hearsay rule had no application for DW1's evidence to be rejected. The sufficiency and credibility of
H and weight to be attached to his evidence had been different matters which had to be considered at the trial. The evidence could not be rejected even before it had been given on the ground that he had neither been the defendant nor a party to the loan transaction and had been testifying in his capacity as an attorney. (paras 3-4)

I

(2) The crux of the defence had been that the change of account numbers to new numbers '1858' and '1877' had been by fraudulent design to show a balance still owing by the defendants whereas the original designated account numbers had shown a '0' balance (exh. P19 and P15). The plaintiff argued that the alleged fraudulent act had merely been to manipulate or reduce the actual position of the problem loan accounts whereas the balance in the original accounts had remained. However in the instant case, the existing TL accounts showed payments in full settlement of the amounts for the first case and second case respectively (exh. P9 and P15) while the 'fraudulently' created ones exhibited a balance in excess of the loan granted. Exhibits P9 and P15 had not been produced and PW1 had not been able to say if they had been in the bank's records. Hence PW1's evidence that this case had involved a mere re-designation of account numbers could not be true as the previous balances had conflicted with the present outstanding figure, the origin of which had also not been proven. (paras 10, 14 & 16)

(3) Right from the issue of the plaintiff's NOD, the defendants had denied receiving the loans for the differing sums and maintained that the new account numbers had not belonged to them. From the facts referred to by the defence and the state of PW1's evidence, particularly the several unexplained contradictions in the plaintiff's own documentary evidence, it had appeared that PW1's evidence had not been credible or reliable and had been deficient on vital issues. He had not been familiar with the relevant records and accounts, of which he clearly had not had personal knowledge of and he had merely relied on assumptions and banking practices. Kamaluddin and other managers of the PG branch of the plaintiff had been crucial witnesses and their non-appearance had gravely affected the plaintiff's claims. The plaintiff's failure to produce them had thus necessitated an adverse inference being drawn against them under s. 114(g) of the EA. (paras 17, 19 & 21)

(4) The plaintiff had not disputed the fraudulent acts of its officers with regards to the defendants' new TL accounts but had insisted that the acts had not affected or diminished their indebtedness. However, no evidence had been produced through appropriate witnesses who had been privy to the facts to rebut the records which had shown otherwise. Similarly, the plaintiff had failed to produce evidence of the outcome of police investigations against the officers against whom reports had been lodged, thus weakening their case further. (para 23)

(5) The short answer to the defence submission that the present suits had been statute-barred by virtue of s. 6(1) of the Limitation Act 1953 ('Act') for breach of contract claims, would be that this had not been the applicable sub-section in this case. As the term action in s. 21(1) had covered a wide range of proceedings and at any stage, it would naturally include any suit such as the present one, which even though had been for breach of contract, had undoubtedly been a proceeding to recover any principal sum of money secured by a charge or mortgage over property. The agreed condition of the TL's had been a first legal charge over property which had been executed in both cases. Accepting that the right to sue had accrued on the issuance of the first NOD on 13 July 1999 as contended by defence counsel, the suits filed on 6 August 2007 had been well within the stipulated 12 year limitation period under s. 21(1). Hence the defence submission that the suits had been statute barred under s. 6(1) of the Act had been erroneous and untenable (para 27)

(6) The defence had raised the allegation of fraud against the plaintiff in respect of the loan accounts which had formed the basis of these claims. PW1, the plaintiff's sole witness, who had absolutely no knowledge of essential facts that had been relevant to this dispute and who had merely been testifying from documents and records that had never been handled by him, had wholly been unable to rebut the *prima facie* evidence of fraud as disclosed by the documentary evidence. (para 28)

(7) As for the claim for general damages, it had been settled law that the loss suffered by the aggrieved party had to be clearly established. DW1 who had given evidence on behalf of the defendants had not been the victim or the aggrieved party who had suffered the loss. Thus he had not been a competent witness to adduce evidence on this issue. Without any other evidence, there was absolutely nothing to establish the losses allegedly suffered by the defendants as a consequence of the plaintiff's wrongful act. (para 31)

(8) In respect of the prayer for damages for breach of contract to be assessed, no particulars had been pleaded as to how the breach had occurred and no evidence had been adduced thereof. DW1 had merely said that the defendants had been asking for RM1 million for losses sustained due to the wrongful acts with no elaboration as to how such losses had been sustained. Since he

had not been a victim to the alleged acts, his evidence had merely been hearsay. Further, the nature of the breach of contract and the type of damages sought had also not been stated either by DW1 or in the pleadings. (para 32)

(9) With regards to the tort of malicious prosecution, apart from showing that the plaintiff's suit had been baseless, the defendants had to take the further vital step of proving that the plaintiff's action in bringing these suits without reasonable cause had been actuated by malice, which had not been done in the present case. (para 33)

Case(s) referred to:
Abrath v. North Eastern Railway Co [1883] 1 QBD 442 ***(refd)***
Abu Bakar Ismail & Anor v. Ismail Husin & Ors & Other Appeals [2007] 3 CLJ 97 CA ***(refd)***
Amanah Merchant Bank Bhd v. Lim Tow Choon (Through Official Assignee) [1994] 2 CLJ 1 SC ***(refd)***
Bonham Carter v. Hyde Park Hotel Ltd [1948] 64 TLR 177 ***(refd)***
Bumiputra-Commerce Finance Berhad v. Hasni Ali & Ors [2008] 1 LNS 883 HC ***(refd)***
Ch'ng Ping Teong v. M & A Securities Sdn Bhd [2007] 5 CLJ 465 CA ***(refd)***
Chooi Sow Fun (F) & Anor v. Lembaga Perancang Keluarga Negara [2000] 8 CLJ 93 HC ***(refd)***
G Visvanathan Govindasamy & Ors v. Phileoallied Bank (Malaysia) Bhd [2004] 3 CLJ 207 CA ***(refd)***
Ilkin Samuels [1963] 1 WLR 106 ***(refd)***
Lo Foi v. Lee Ah Hong & Ors [1998] 1 CLJ Supp 244 HC ***(refd)***
Ong Ah Bee v. Hii Chung Siong, Robin [1993] 1 CLJ 504 HC ***(refd)***
Perwira Habib Bank (M) Bhd v. Hong Huat Holdings Sdn Bhd [1991] 2 MTC 102 ***(refd)***
Selvaduray v. Chinniah [1939] 1 LNS 107 HC ***(refd)***
Subramaniam v. PP [1956] 1 LNS 115 PC ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***
Tetuan Bee Ling & Co lwn. Vijendran Ponniah [2010] 6 CLJ 643 CA ***(refd)***
United Overseas Finance Ltd v. Victor Sakayamary [1997] 3 SLR 211 ***(refd)***
Whitworth v. Hall [1824 - 1834] All ER 484 ***(refd)***
Wisniewski v. Central Manchester Health Authority [1998] PIQR 324 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 3
Evidence Act 1950, ss. 32, 101(1), 114(g), (h)
Limitation Act 1953, ss. 2, 6(1), 21(1)

For the plaintiff - Norlia Tahir; M/s Syed Alwi, Ng & Co
For the defendants - Munjeet Waalib; M/s Munjeet Waalib & Assocs

Reported by Sharmini Pillai

A

JUDGMENT

Gunalan Muniandy JC:

[1] These suits arise out of two term loans ('D1 and D2') granted by the plaintiff ('P') bank to the defendants. They are for non-payment
B of instalments by D1 and D2 allegedly in breach of the loan agreements entered into between the parties.

Summary Of Facts

[2] Upon the request of D1 and D2, P *vide* letters of offer
C ('L/O') dated 3 October 1997 and 3 December 1997 offered D1 and D2 two term loans (T/L (1) and (2)) each amounting to RM300,000 at the prescribed rate of interest. In respect of T/L (1) D2 executed a charge over land in favour of P while T/L (2) was secured by a similar charge executed by D1. Upon the alleged failure of D1 and D3 to settle
D overdue instalments under the two T/L, two separate notices of demand ('NOD') and withdrawal of loan facility were issued by P's solicitors to them. These writs dated 12 July 2007 and 1 August 2007 were issued against them when they failed to comply with the notices.

E *Preliminary Objection By P's Counsel (P/C)*

[3] The objection raised was against PW1's competency to testify on behalf of D1 and D2 by virtue of a Power of Attorney ('P/A') issued to him by D1 and D2 and duly registered at the Muar High Court (exh. D36). Admissibility of D36 was objected to on the ground that it
F was registered only in year 2009 whereas this suit commenced in year 2007 and as such, DW1's evidence had to be wholly rejected. He was said to not have had personal knowledge of facts occurring before year 2009. No provision of law or authority was shown to the effect that a witness who appears under a valid P/A issued by a party to the suit is
G not competent to testify unless it was registered prior to commencement of the suit. As to the question of personal knowledge of facts at the material time, this was a question of fact to be determined from the evidence given by DW1 and not to be peremptorily decided before hearing it. Counsel referred to s. 32 of the Evidence Act 1950 and the
H leading case of *Subramaniam v. PP* [1956] 1 LNS 115 which decided that evidence of statements made to a witness by a person who himself is not produced as a witness may or may not be hearsay depending on the object of the evidence. In the instant case, DW1's evidence as a whole did not appear to consist of statements made by D1 and D2 but of facts from his personal knowledge. Counsel also cited the case of
I *Ch'ng Ping Teong v. M & A Securities Sdn Bhd* [2007] 5 CLJ 465 regarding the stringent conditions for s. 32 to be invoked to admit statements by persons who are dead, cannot be found, etc.

[4] I held P/C's argument that DW1 could testify only by recourse to s. 32 to be flawed as this section had no application in this instance because DW1's evidence was not based on statements given by the defendants. Hence, the question of compliance with the conditions in s. 32 did not arise. Similarly, for the same reason, the hearsay rule had no application for DW1's evidence to be rejected. The sufficiency and credibility of and weight to be attached to his evidence were different matters to be considered at the trial. The evidence could not be rejected even before it is given on the ground that he was neither a defendant nor a party to the loan transaction and was testifying in the capacity of an attorney.

[5] Common Issues To Be Tried (495 And 565/2007)

(a) Whether the new account numbers '187-7' (first case) and '185-8' (second case) on which the claims are based were genuine or fraudulently created by P's servant/agent?

(b) Whether P's servant/agent had fraudulently manipulated defendants' designated term loan accounts bearing numbers '1609' and '1670'?

(c) Whether defendants were still liable to pay P the sums claimed under the new T/L account numbers?

(d) Whether these suits are time-barred under the Limitation Act?

(e) Whether defendants had proved entitlement to the reliefs claimed for in their counter-claim?

Analysis Of Evidence

[6] It was common ground that the statements of account for the designated T/L accounts bearing numbers '1609' and '1670' were as per exh. P9 and P16 respectively, which was evidence tendered by P themselves. Similarly, P tendered the loan account master for both accounts as exh. P19 and P15. Both these documents are crucial exhibits as they relate specifically to the loan agreements that both parties had entered into dated 12 January 1998 and 22 January 1998 respectively.

[7] The statements of account (exh. P9 and P16) reveal that certain debit adjustments to accounts '1609' and '1670' as shown in the debit column had been made which had the effect of increasing the defendants' indebtedness and/or offsetting the payments to the account. It was alleged that these were manipulations by two of P's officers at their Pasir Gudang ('PG') branch, namely, one Kamaluddin bin Omar and another, Ab Rahim b Bustaman.

[8] The loan account master for both the above accounts show explicitly that on the date thereof there was no longer any debt due in respect of both the loan agreements. This meant that the loans disbursed under these agreements had been fully settled. This was consistent with the defence raised that the defendants were no longer indebted to P in respect of both these agreements. The documentary evidence being that of P themselves which lent credence to the defence allegations of fraud and manipulation, it was incumbent for P to rebut the clear contents of the documents. P produced as their sole witness (PW1) to prove their claims and rebut the defence case, an officer who had been employed by P only since 1 April 2007 whereas the transactions under accounts '1609' and '1670' took place way back in 1998. PW1 had, thus, absolutely no personal knowledge of the accounts and the relevant transactions. As regards the debit adjustments in the statements of account alleged to be false, he could merely testify from normal practice without being able to say what these were meant for. More damaging was the fact that PW1's oral evidence on the defendants' indebtedness seemed to contradict P's own contemporaneous documents. His competency to testify on the material facts in issue going to the crux of these claims was obviously in grave doubt. He was unable to say whether the adjustments were with the knowledge and under the instructions of the defendants.

[9] PW1 was not an officer from the PG branch of P but from the headquarters ('HQ') and therefore, was not in a position to have personal knowledge of the above accounts and the transactions that took place at the material time. His evidence was substantially based on and guided by records and documents, purportedly in P's custody at the PG branch, of which too he had no personal knowledge. However, SP1 failed to produce any of these important documents or records which were the basis of his evidence leading to a possible adverse inference that this evidence if produced would be unfavourable to P's case. It could also be possibly inferred that the documents and records referred to were in fact non-existent. This could account for PW1's response to several vital questions when he answered that he did not know or could not recall. Such is not the quality of evidence that would be adequate to rebut the serious allegations made against P's officers which appeared to tally with P's own documentary evidence as alluded to.

[10] The crux of the defence was that the change of account numbers to new numbers '1858' and '1877' was by fraudulent design to show balance still owing by defendants whereas the original designated account numbers showed a '0' balance (exhs. P19 and P15). Several facts were referred to in support of this allegation, which, it was contended, PW1's evidence merely by reference to unknown records had failed to rebut.

[11] PW1 gave evidence from records that the new T/L accounts bearing the above numbers were for loans amounting to RM318,000 ('1858') and RM313,000 ('1877') which were disbursed on 6 May 1998. However PW1 failed to provide any documentary proof, which should have been made available, of the disbursement of these loans to the defendants. As to why the records could not be produced was unexplained. More importantly, exh. P7 (first case) and exh. P8 (second case) state that there was no voucher and credit was unknown. The statements of claim disclose that these claims arise out of letters of offer ('L/O') for T/Ls of RM300,000 only. No doubt the rate of interest is variable. But, the principal sum would remain fixed even if it can be accepted that the account numbers of the loan agreements had been updated or readjusted. PW1, not having personal knowledge of the alleged reassignment of account numbers, was certainly unable to resolve the discrepancy in figures.

[12] The plaintiff bank charged the said officer, Kamaluddin bin Omar, with various allegations of "Fraudulent Activities In The Credit Department". (See exh. P7 pp. 75 - 93 @ p. 93, Bundle A - first case and exh. P8, pp. 69 - 78 @ p. 74, bundle A - second case). In the appendix, these two accounts are listed as fraudulently opened T/L accounts. P thereafter lodged a police report against the said Kamaluddin and other officers from their PG branch alleged to be involved in fraudulent activities relating to settlement and opening of T/L accounts. Yet, despite a notice to produce issued by the defendants in these cases to produce the police report P failed to do so. The report could surely have thrown some light on the actual criminal activities alleged to have been engaged in by P's officers, particularly as regards manipulation of the designated accounts and fraud in opening of the new accounts. In any event, evidence emerging from P's own documentary evidence lent credence and support to the defence allegation that the new T/L accounts were fabrications for non-existent loans.

[13] P's counsel submitted that the allegation of fraud against defendant's accounts had no effect as to the credit and debit of moneys in the accounts citing exh. P7 (first case) and exh. P8 (second case) which read as follows:

> That you, by using User-ID No. 19108999, had fraudulently created nine (9) new Term Loan accounts (as tabulated in Appendix 5), to settle the existing Term Loan accounts with the purpose to suppress the actual positions of the Delinquent and Non-Performing Loans (NPL) of the Branch.

[14] It was argued that the alleged fraudulent act was merely to the extent of manipulation or reduction of the actual position of the problem loan accounts whereas the balance in the original accounts remained. That may appear to be so but in the instant case the existing TL accounts showed payments in full settlement of the amounts while the 'fraudulently' created ones exhibited a balance in excess of the loan granted. The payment in full settlement is supported by a document number in exh. P9 (first case) and exh. P15 (second case). Exhibits P9 and P15 must have, presumably, been produced from P's computer system so that the numbered documents in relation to the payments must have been in existence. But, these documents were not produced. Neither was PW1 able to say whether they were in the bank's records. Failure to produce this vital piece of evidence should certainly result in an adverse inference being drawn against P as they appeared to be, without any justification, withholding evidence in their possession that should have been produced, (s. 114(g) and (h), Evidence Act 1950).

[15] The defence also challenged PW1's assertion that what had occurred in this case was a mere change of account numbers and submitted that this was factually wrong based on P's own documentary evidence. Firstly, that the monthly instalments in the new accounts differ from the loan agreements (LAs). P's answer was that the letter of offer ('LO') provides for P to alter the monthly instalments. However, the LO in para. 10 only refers to change of base lending rate (BLR) or increase/reduction of accrual sum due to charges. However, in instances of variation to spread or margin above BLR, it is mandatory for notice to be given to borrowers. It was contended that the onus was on P to prove that the differing monthly instalment adverted to was due to the change in BLR and that due notice had been given but that P had failed to do so in respect of both accounts. Also, that since the LA when BLR stood at 9.65% it had significantly dropped so that the monthly instalment should fall and not rise. This meant that PW1's explanation for the change in the instalment amount was mere speculation and could not be true.

[16] PW1 also maintained that the present claims relied on statements pertaining to the alleged reassigned account numbers '1897' and '1858'. He admitted that new account numbers had subsequently been assigned these accounts - '8951' and '6956' respectively where the starting balance was the amount carried forward from the accounts bearing the previous numbers. This was contrary to '1877' and '1858' both of which started with over RM300,000 outstanding whereas the original (designated) accounts had a '0' outstanding balance. Hence, PW1's evidence that this case involved merely redesignation of account numbers could not be true as the previous balance conflicted with the present outstanding figure, the origin of which was also not proven.

[17] Rather than mere reassignment of account numbers the new accounts seemed to concern loans separate and distinct from those in the original designated numbers based on the LOs. The LOs which are the basis of the claims in both cases are for loans amounting to RM300,000 only which is consistent with the pleadings. Right from the issuance of P's solicitors' notice of demand and other notices, D had through their solicitors denied ever receiving loans for the differing sums - RM313,000 and RM318,000 - and maintained that the account numbers stated in the notice of demand dated 16 May 2000 did not belong to them. Their solicitors *vide* letter dated 17 July 2000 requested from P documents pertaining to the alleged loans for the said sums but till to date no response was forthcoming from P. In view of the express denial by defendants as above, the onus was on P to strictly prove disbursement of these loan sums to defendants which was contrary to not only the statement of claim but all the documentary evidence as well including the loan agreements. P failed to discharge the onus of proof in this respect as PW1's evidence on this point was merely based on assumptions and observation of the records.

[18] P contended that defendants had been duly notified of the reassignment of account numbers *vide* letter dated 6 May 1998 (ID6) which the defence disputed on the ground the address stated differed from the address of service mentioned in the LA. Reference was made to DW1's evidence in cross-examination that with addresses situated next to each other belonged to properties in which the defendants had been residing since and thus, could be presumed to have received the notice. ID6 was, on that score, said to be valid and not defective. While conceding that ID6 was sent by ordinary and not registered post, P's counsel submitted that this form of posting was valid to invoke the deeming provision by referring to *Amanah Merchant Bank Bhd v. Lim Tow Choon (Through Official Assignee)* [1994] 2 CLJ 1 which held:

> It is sufficient for the appellant to show that the notice was correctly addressed, prepaid and delivered to the post office and acknowledged for service by the postal authority. Once these facts have been established, the deeming provision will inevitably apply.

(See also *Bumiputra-Commerce Finance Berhad v. Hasni Ali & Ors* [2008] 1 LNS 883 on the similarity between ordinary or normal post and registered post).

Be that as it may, PW1 was neither the maker of ID6 nor did he have any personal knowledge of it. It was important to note that for service to be deemed sufficient, the onus on P was to prove that:

A (i) the notice was correctly addressed;

(ii) it was prepaid and delivered to the post office; and

(iii) the postal authority had acknowledged it for service.

B Suffice to say that none of the above was proved in respect of ID6. PW1 merely referred to a photocopy of the notice without any further supporting evidence, particularly that it was duly delivered to the postal authority. Hence, I held that the mere reference to ID6 without admission into evidence was insufficient to invoke the deeming clause
C that it was properly served on the defendants, PW1, who obviously did not have custody of the records of posting of ID6 was not in a position to prove any of the above.

[19] From the facts referred to by the defence and the state of PW1's evidence itself, particularly the several unexplained contradictions with P's
D own documentary evidence, it appeared that his evidence was not credible, unreliable and deficient on vital issues. It stemmed from the fact that he was not familiar with the relevant records and accounts, of which he clearly had no personal knowledge and was merely relying on assumptions and banking practice. It was incumbent upon P who bears
E the onus of strictly proving these claims, to produce all necessary and material witnesses who had personal knowledge of the designated accounts and the transactions that took place at the relevant point in time. Defence counsel ('D/C') submitted that the said Kamaluddin bin Omar and P's managers at the PG branch who had handled or
F supervised these accounts would be the only competent witnesses to testify in this case and not PW1 who was obviously unable to produce satisfactory evidence. In this regard, D/C sought to invoke s. 114(g), EA against P for failing to call them as witnesses. PW1 conceded that these were the persons who could testify accurately on the facts in
G dispute pertaining to these accounts and that no steps had been taken by P to trace their whereabouts. Neither did he know if they were still employed by P.

[20] It is trite law that all witnesses who had intimate knowledge of the facts and circumstances relating to the issues in dispute are
H considered vital and should not be dispensed with without compelling reasons. In the case of *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381, on the issue of adverse inference for non-calling of vital witnesses, the Federal Court adopted the views of Brooke LJ in *Wisniewski v. Central Manchester Health Authority* [1998] PIQR 324, who,
I after quoting from a number of authorities, said this:

> From this line of authority I derive the following principles in the context of the present case:

(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action. A

(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness. B

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue. C

(4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified. D

[21] In the present instance, there was not an iota of doubt that Kamaluddin and the other managers at the PG branch of P who had intimate knowledge of the material facts relating to the dispute and the nature of the transactions that had actually taken place were crucial witnesses. This was all the more so as P's stand was in conflict with the bank's statements and records that attested to defendants having fully settled the loans in both these cases. Only they could shed light on whether P's assertions contrary to the said official records had any basis at all and as such, their non-appearance gravely affected P's claims. PW1, who had no personal knowledge whatsoever of the relevant facts in dispute was certainly not the appropriate witness to testify on the issue at hand. P's failure to produce the said witnesses, therefore, necessitated an adverse inference being drawn under s. 114(g). On the same point, it would be instructive to refer to *Sarkar on Evidence* 16th edn, at p 1837 which states: E F G

> It is the bounden duty of a party personally knowing the whole circumstances to give evidence and to submit to cross examination. Non-appearance as a witness would be the strongest possible circumstance to discredit the truth of his case *Gurbakhsh v. Gurdial*, A [1927] PC230. H

[22] In submitting that P was, as the principal, liable for the fraudulent acts of Kamaluddin and the other officers against the defendants, defence counsel referred to the case of *Abu Bakar Ismail & Anor v. Ismail Husin & Ors & Other Appeals* [2007] 3 CLJ 97 where Gopal Sri Ram, JCA (as he then was) in explaining the principle quoted with approval the following passage from the judgment of GP. Selvam J, in *United Overseas Finance Ltd v. Victor Sakayamary* [1997] 3 SLR 211: I

A In my view the above statement in *Halsbury's Laws of England* (referred to Doshi) does not apply if the facts can be brought within the rule in *Lloyd v. Grace Smith & Co* [1912] AC 716, *Uxbridge Permanent Benefit Building Society v. Pickard* [1939] 2 KB 248, *Navarro v. Moregrand Limited* [1951] 2 TLR and *United Overseas Finance Limited v. Yew Siew Kiew* [1993] 3 SLR 207. The rule is that a principal is responsible for
B the wrongs his agents have done in the course of his employment - that is the course of conducting the business entrusted to him. Phrases such as 'acting in the course of employment' or 'acting within the scope of his agency must be construed liberally - per Lord Macnaghten in *Lloyd v. Grace Smith & Co*, at p. 736.

C **[23]** P did not dispute the fraudulent acts of its officers as regards defendants' new TL accounts but yet insisted that the acts did not affect or diminish their indebtedness. However, no evidence was produced through appropriate witnesses who were privy to the facts that could rebut the records that seemed to show otherwise. Similarly, P failed to
D produce evidence of the outcome of police investigations against the officers against whom they had lodged reports. As P had initiated the criminal action, they would, presumably, have information of the outcome. The onus was not on DW1 to trace and produce the police report which he had allegedly lodged against Kamaluddin. On the
E contrary, it was on P to disclose information in their possession or to explain the absence of information on this matter, neither of which was done, thus, further weakening their case.

Defence Of Limitation

F **[24]** Defendants' contention in the alternative was that this suit was statute-barred under the Limitation Act, 1953 ('the Act') for being filed outside the six years' limit from the date the cause of action arose. It is trite law that in a suit for default of payment under an agreement, the cause of action accrues when a notice of demand is issued and there
G is failure to comply with it within the stipulated time. Reliance was placed on the principle that when the defence of limitation is raised, the burden of pleading and proving that the action was brought within the limitation period shifts to the P. (See *Ong Ah Bee v. Hii Chung Siong, Robin* [1993] 1 CLJ 504).

H **[25]** P issued the first notice of demand ('NOD') on 31 July 1999 (exh. P17) following which no payment was received from defendants. The writ was filed on 6 August 2007. There were subsequent notices of the same nature issued, including by the present solicitors, but for the purposes of determining the present issue I would take exh. P17 as
I the material notice and 31 July 1999 as the relevant date for computation of the limitation period. The date of filing (6 August 2007) undoubtedly exceeded the deadline for filing a suit for breach of contract under the Act (s. 6).

[26] P's counsel, on the other hand, submitted that the applicable provision for the present cause of action was s. 21(1) of the Act as it was an action to recover money secured by a mortgage or charge or to recover proceeds of the sale of land "where the limitation was before the expiration of twelve years from the date when the right to receive the money accrued". Further, that the TL in this case was without doubt a loan secured by charge over land so that s. 21(1) applied. Reference was made to the case of *G Visvanathan Govindasamy & Ors v. Phileoallied Bank (Malaysia) Bhd* [2004] 3 CLJ 207 which explained the applicability of s. 21(1) of the Act. It was held, *inter alia*, in this case that by virtue of the definitions of the terms "action" and "proceeding" under s. 2 of the Act and s. 3 of the Courts of Judiature Act, 1964 respectively, that any action "to enforce, *inter alia*, the charge or mortgage or ... recover any principal sum secured by a charge or mortgage" would be caught "by the 12 years limitation period stipulated in s. 21(1) of the Limitation Act".

[27] The short answer to the defence submission that the present suits are statute-barred by virtue of s. 6(1) of the Act for being breach of contract claims would be that this is not the applicable sub-section in this case. As the term action in s. 21(1) covers a wide range of proceedings and at any stage, it would naturally include any suit such as the present one, which even though is for breach of contract, is undoubtedly a proceeding to recover any principal sum of money secured by a charge or mortgage over property. The agreed condition for the TLs was a first legal charge over property which was executed in both cases. Accepting that the right to sue accrued on issue of the first NOD on 13 July 1999 as contended by D/C, the suits filed on 6 August 2007 were well within the stipulated 12 years limitation period under s. 21(1). Hence, the defence submission of the suits being statute-barred under s. 6(1) of the Act was erroneous and untenable. As such the authorities cited by defence's counsel on this subsection are irrelevant for determination of the current issue.

Decision

[28] In a civil trial, the plaintiff bears the burden of proving the particulars of his claim on a balance of probabilities. This is called the legal burden of establishing the case which lies on the P throughout the trial (s. 101(1), Evidence Act 1950) as distinguished from evidential burden which is the burden of introducing evidence. The latter would shift to the defendant only upon the Plaintiff having discharged its onus of establishing its pleaded case, failing which the case would fail irrespective of whether the defendants have established their defence.

A The correct approach to be adopted was discussed in *Selvaduray v. Chinniah* [1939] 1 LNS 107 where Terell Ag CJ adopted the position explained by Brett MR in *Abrath v. North Eastern Railway Co* [1883] 1 QBD 442, at p. 452 and concluded:

> B After the conclusion of the whole case there must be some preponderance in his favour. It may be true that the plaintiff established a *prima facie* case, but at the conclusion of the trial the learned judge has found that the position was exactly even, ie, that any preponderance in the plaintiff's favour had disappeared. That being the case the plaintiff must necessarily fail, as he has not discharged the C onus which is upon him. No doubt the defendant would equally have failed if he had been the claimant and had tried to establish, as a substantive part of his case, the alternative version which he tried to prove in answer to that of the plaintiff. But as he was not the claimant, that consideration is quite immaterial. It is quite sufficient for his purpose if he can satisfy the court that the plaintiff has not established D his case and the learned judge has so found.

In short, the evidence has to be viewed as a whole at the conclusion of the case and a determination made whether there is preponderance in favour of the plaintiff. Returning to the instant case, P has to establish the thrust of its case, which is that the defendants were indebted to them E in the sums pleaded. This the plaintiff failed to do for reasons discussed in the analysis of evidence. The defence had raised the allegation of fraud against plaintiff in respect of the loan accounts which formed the basis of these claims based on P's own documentary evidence which clearly supported the allegation. PW1, plaintiff's sole witness, who had F absolutely no personal knowledge of essential facts relevant to the dispute and was merely testifying from documents and records that had never been handled by him, was wholly unable to rebut the *prima facie* evidence of fraud disclosed by the said documentary evidence. In conclusion, I found that the plaintiff had failed to prove, on a balance of G probabilities, the claims in both cases which I dismissed with costs.

[29] Defendants' Counter-Claim'

A. Claim For Discharge of Charge

H P's counsel argued that P had no obligation to discharge the charge as defendants had failed to settle the loans. In view of my finding in the main suits that the loans had been extinguished by full settlement, P had no further right to maintain the charge over the properties which had to be released to the defendant unencumbered. I Defendants were, thus, entitled to the reliefs under the above head as consequential orders were necessary to carry into effect the said decision. On this ground and for the stated purpose, I granted the

orders as prayed for in para. 31(a) and (b) of the counter-suit under particulars of special damages. Likewise, I granted the reliefs as per prayers (c) and (d) for the same reason.

B. Damages For Breach of Contract and Malicious Prosecution

The first claim is for RM40,000, being legal costs. It is trite law that a claim for special damage, as opposed to general damage, must be pleaded with full particulars and strictly proved. The law would not "presume it to be the natural and probable consequence of the wrong suffered" (*Chooi Sow Fun (F) & Anor v. Lembaga Perancang Keluarga Negara* [2000] 8 CLJ 93; *Ilkin b Samuels* [1963] 1 WLR at p. 106 (per Diplock, LJ)].

[30] The above claim was quite obviously not supported by particulars and not proved at all as no evidence was adduced to substantiate it. Hence, I had no hesitation to dismiss the claim as being baseless.

[31] Moving on to the claim for general damages where an order of court was sought to assess damages for malicious prosecution and injury to reputation, it is settled law that the loss suffered by the aggrieved party must be clearly established. The first point to note was that DW1, who gave evidence on behalf of the defendants, was not the victim or aggrieved party who had suffered any loss. He was, thus, not a competent witness to adduce evidence on this issue and without any other evidence, there was absolutely none to establish the losses allegedly suffered by defendants as a consequence of P's agents' wrongful act. P's counsel referred to the Supreme Court case of *Perwira Habib Bank (M) Bhd v. Hong Huat Holdings Sdn Bhd* [1991] 2 MTC 102 which held:

> It is pointless to deal with assessment of damages, where the loss has not been established.

[32] In respect of the prayer for damages for breach of contract to be assessed, no particulars were pleaded such as how the breach had occurred and no evidence adduced thereof. DW1 merely said that defendants were asking for RM1.0 million for losses sustained due to the wrongful acts with no elaboration whatsoever how losses to that extent had been sustained. This was apart from the fact that his evidence on this issue would amount to mere hearsay as he was not the victim of the alleged acts. Equally important was that neither in the pleadings nor in DW1's evidence was it disclosed the nature of the breach of contract and the type of damages sought - liquidated or unliquidated. The law is settled that for a party to succeed in any claim

for damages, it is not sufficient to merely plead losses and itemise them without proving the same. This is a classic case that fits the reminder by Lord Goddard in *Bonham Carter v. Hyde Park Hotel Ltd* [1948] 64 TLR 177, 178 as follows:

> Plaintiffs must understand that if they bring action for damages it is for them to prove their damages; it is not enough to write down the particulars and, so to speak, throw them at the head of Court, saying: 'This is what I have lost; I ask you give me these damages? They have to prove it.

[See also *Lo Foi v. Lee Ah Hong & Ors* [1998] 1 CLJ Supp 244].

[33] As regards the tort of malicious prosecution, the claimant (defendants) must prove the elements of this tort. It is insufficient to merely show that that plaintiff's suit was baseless on the ground that the allegations of fraud that the defendants had made were obvious and well-founded. The defendants had to take the further vital step of proving that the P was actuated by malice in bringing these suits without reasonable cause. In discussing the elements of this tort, Brett MR in *Whitworth v. Hall* [1824 - 1834] All ER 484 (adopted in the Court of Appeal case of *Tetuan Bee Ling & Co lwn. Vijendran Ponniah* [2010] 6 CLJ 643) remarked as follows:

> ... The points which it is necessary for the plaintiff to substantiate in order to make out his case are not in doubt. The question as to this has often been decided, and the rule is well established. It is not enough to show that the plaintiff is innocent of the charge made against him. He must show that the prosecution was instituted without reasonable and probable cause, and with a malicious intention in the mine of the defendant - not a mere intention to carry the law into effect, but a malicious to injure the plaintiff; the burden of proving each proposition is on the plaintiff ...

[34] In conclusion, I found the present claim for damages to be a typical case of merely stating what was lost in monetary terms without any proof of loss and leaving it to the court to order compensation without the basis being shown. I therefore, dismissed the prayers for damages in the counter-claim.